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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GREGORY PERZEL OLIVER, Defendant and Appellant.	H025444 (Santa Clara County Super. Ct. No. CC123775)

Following a court trial, defendant Gregory Oliver was convicted of one count of forcible lewd and lascivious conduct on a child under the age of 14 years. (Pen. Code, § 288, subd. (b).) On appeal, defendant raises three issues. First, he contends that there was insufficient evidence to support the conviction. Second, he contends that the case must be remanded for a new *Romero* hearing.[1] Finally, the court erred in failing to award him any custody credits. (Pen. Code, §§ 4019, 2933.1, subd. (a).)

Facts and Proceedings Below

The nine-year old victim testified at the preliminary hearing that her father, defendant, pulled down her pants and panties and touched her "pee pee" with his hands

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1 *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

more than five times.[2] This made her feel dirty. Defendant told her not to tell. In addition, defendant put his mouth on her "pee pee" more than five times on different days.

At trial, 15 year-old Marianna R. testified that when victim lived with her in a foster home, which was about two years before defendant's trial started, victim told her that her father had touched her vagina with his hands.

Thirty-year-old S. W. testified that defendant had become her stepfather when she was nine or 10 years old. He molested her from when she was about 10 until she was 11 or 12 years old. Defendant molested her by touching her chest and vagina with his fingers, and touched her vagina with his mouth more than once.

Defendant took the stand in his own defense. He testified that he never pulled down victim's pants and panties. Further, he did not touch or put his mouth on her vagina. With regard to S. W., he admitted that he pulled down her pants and spanked her "butt," but denied that he did the other things about which she testified.

Defendant admitted that he had two prior burglary convictions. The court found true the allegation that these convictions were strikes within the meaning of Penal Code sections 667.5, subdivision (b)(1) and 1170.12.

Sentencing occurred on December 17, 2002. Defendant's *Romero* motion to dismiss the strikes was denied. The court imposed a sentence of 25 years to life and awarded defendant 449 days of actual credit, but no conduct credits.

Defendant filed a timely notice of appeal.

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[2] Victim did not testify at trial. Pursuant to a stipulation, the trial court reviewed the preliminary hearing transcript of victim's testimony when she was nine years old. In exchange for the complaining witness not testifying at trial and the agreement that this would be a court trial, the prosecutor agreed to dismiss an aggravated sexual assault charge (Pen. Code, § 269).

Discussion

Sufficiency of the Evidence

Defendant contends that there was insufficient evidence of force or duress to support his conviction under subdivision (b) of Penal Code section 288. Further, he asserts that the conviction must be reduced to the lesser-included offense of a violation of Penal Code section 288, subdivision (a).

The test for determining a claim of insufficient evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Johnson* (1980) 26 Cal.3d 557, 577-578.) In making this determination, we view the evidence in the light most favorable to the People and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206.) We are not required to ask whether we believe that the evidence at the trial established guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) Instead, the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Ibid*.)

A lewd act (Pen Code, § 288, subd. (a))[3] comes within the provisions of section 288, subdivision (b) if the act was committed "by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person . . . ." (§ 288, subd. (b).)

In finding defendant guilty, the trial court found there was sufficient evidence of force as follows: "In sum and substance, the slightest force above that which is necessary

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[3] Unless otherwise noted, all statutory references are to the Penal Code.

to do the act is sufficient, therefore the pulling down of the garment or the panties is sufficient force . . . ."

Relying on this court's decisions in *People v. Schulz* (1992) 2 Cal.App.4th 999 (*Schulz*) and *People v. Senior* (1992) 3 Cal.App.4th 765 (*Senior*), defendant asserts that the requisite use of force above and beyond that needed to accomplish the act is present only if a "defendant grabs or holds a victim who is trying to pull away.[4]

In *People v. Bolander* (1994) 23 Cal.App.4th 155 (*Bolander*), we discredited "dicta" in both *Schulz* and. *Senior*. We stated: "[I]n light of convincing criticisms set forth in [*People v.*] *Babcock* [(1993) 14 Cal.App.4th 383 (*Babcock*)] and [*People v.*] *Neel* [(1993) 19 Cal.App.4th 1784 (*Neel*)], we respectfully disagree with the interpretation of the 'force' requirement of section 288, subdivision (b) discussed in *Schulz* and *Senior*." (*Bolander*, *supra*, 23 Cal.App.4th at pp. 160-161.) In *Schulz*, we had stated that "[w]e do not regard as constituting 'force' the evidence that defendant grabbed the victim's arm and held her while fondling her" (*People v. Schulz, supra,* 2 Cal.App.4th at p. 1004), while, in *Senior*, we had stated that we did "not regard as constituting 'force' the evidence that defendant pulled the victim back when she tried to pull away from the oral copulations . . . ." (*People v. Senior, supra,* 3 Cal.App.4th at p. 774.)

In *Bolander*, the defendant pulled down the victim's shorts; when the victim tried to pull them back up, the defendant "bent [him] over, put his hand on [the victim's] waist, pulled [the victim] towards him, and put his penis in [the victim's] anus." (*Bolander*, *supra*, 23 Cal.App.4th at p. 158.) Accordingly, we reasoned that the "force defendant used on [the victim] to accomplish the act of sodomy [was] no greater than that used to hold a crying victim who was trying to escape in a corner or that used to pull and hold a victim's shoulders to prevent her from resisting." (*Id*. at p. 160.) However, as noted, in

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[4] In addition, defendant cites two cases, *People v. Babcock* (1993) 14 Cal.App.4th 383 and *People v. Bolander* (1993) 23 Cal.App.4th 155 to support this proposition.

light of the criticisms set forth in *Babcock* and *Neel*, we joined those courts that held that " ' [i]n subdivision (b), the element of force, violence, duress, menace or fear of immediate and unlawful bodily injury on the victim or another person is intended as a requirement that the lewd act be undertaken without the consent of the victim. [Citation.] As used in that subdivision, "force" means "physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself." [Citations.]' " (*Id.* at p. 161.) Thus, applying this standard, we concluded that the "defendant's acts of overcoming the victim's resistance to having his pants pulled down, bending the victim over, and pulling the victim's waist towards him constitute[d] force within the meaning of subdivision (b) 'in that defendant applied force in order to accomplish the lewd act[] without the victim's consent.' [Citation.]" (*Ibid*.)

The origin of the definition of force that we adopted in *Bolander* comes from *People v. Cicero* (1984) 157 Cal.App.3d 465 (*Cicero*).[5] The *Cicero* court took the position that " ' force' should be defined as a method of obtaining a child's participation in a lewd act in violation of a child's will . . . ." (*Cicero*, *supra*, 157 Cal.App.3d at p. 476.) The *Cicero* court concluded that the "Legislature did not intend to eliminate from subdivision (b) the requirement that a lewd act be undertaken against the will of the victim where the victim suffers no physical harm." (*Id*. at p. 480.) In acknowledging that this proposition was somewhat at odds with a 1981 amendment, which deleted language from section 288, subdivision (b) that required that the act be "against the will of the victim," the court reasoned that the purpose of the 1981 amendment "was to make clear that the prosecution need not prove resistance by the [victim]." (*Ibid*.)

Consequently, the *Cicero* court summarized the rules applicable to section 288, subdivision (b) as follows: "Where a defendant uses physical force to commit a lewd act

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[5] This definition is used in CALJIC No. 10.42 in instructing a jury on the definition of the term "force" as used in Penal Code section 288, subdivision (b).

upon a child under the age of 14, and the child suffers physical harm as a consequence, the defendant has committed a lewd act 'by use of force' under subdivision (b). Consent is no defense. Where no physical harm to the child has occurred, the prosecution has the burden of proving (1) that the defendant used physical force substantially different from or substantially in excess of that required for the lewd act and (2) that the lewd act was accomplished against the will of the victim. . . . [I]t is an affirmative defense that the victim knowingly consented to the lewd act." (*Id*. at pp. 484-485.)

In *Cicero*, the court found its definition of force met because the "defendant's act of picking the girls up and carrying them along were applications of physical force substantially different from *and* substantially greater than that necessary to accomplish the lewd act of feeling their crotches." (*Cicero*, *supra*, 157 Cal.App.3d at p. 474.)

Since *Cicero*, various appellate courts have addressed the issue of just what actions or gestures will constitute the element of force a defendant must exert to be substantially different from or substantially in excess of that required for the lewd act itself. (See *People v. Pitmon* (1985) 170 Cal.App.3d 38 (*Pitmon*); *People v. Mendibles* (1988) 199 Cal.App.3d 1277 (*Mendibles*); *People v. Bergschneider* (1989) 211 Cal.App.3d 144 (*Bergschneider*) superseded by statute as stated in *People v. Valentine* (2002) 93 Cal.App.4th 1241.)

In *Pitmon*, the defendant grabbed the eight-year-old victim's hand, placed it on his own genitals and used it to rub himself. Thereafter, the defendant made the victim orally copulate him. While so doing, the defendant pushed the victim's back during each performance of that act. (*Pitmon*, *supra*, 170 Cal.App.3d at pp. 44-45, 48.) In holding the evidence sufficient to sustain convictions under subdivision (b), the Third District Court of Appeal stated: "There can be little doubt that defendant's manipulation of [the victim's] hand as a tool to rub his genitals was a use of force beyond that necessary to accomplish the lewd act. The facts show [defendant] had hold of [the victim's] hand throughout this act. Further, the record reveals that in those instances in which [the

victim] orally copulated defendant, defendant slightly pushed [the victim's] back during each performance of that act. Again this displayed a use of physical force that was not necessary for the commission of the lewd acts." (*Id*. at p. 48.)

In *Mendibles*, the defendant held the victims as he made one victim wash his penis on one occasion and the other victim orally copulate him on another occasion. (*Mendibles*, *supra*, 199 Cal.App.3d at pp. 1285-1286.) The *Mendibles* court concluded that this was "unequivocal evidence of the application of physical force as defined by *Cicero*." (*Id*. at p. 1307.)

In *Bergschneider,* the victim testified that when the defendant attempted to orally copulate her, she tried, unsuccessfully, to push his head away. The Fourth District Court of Appeal concluded: "This represents the application of force 'substantially greater than that necessary to accomplish the lewd act itself." (*Bergschneider*, *supra*, 211 Cal.App.3d at p. 154.)

In *People v. Neel* (1993) 19 Cal.App.4th 1784, the defendant committed several lewd acts with his nine-year old daughter. The court found his conduct of forcing her head down on his penis when she tried to pull away and grabbing her wrist, placing her hand on his penis and making her masturbate him constituted evidence showing the defendant used force to accomplish the lewd acts against her wishes. (*Id*. at pp. 1785-1786.)

In *People v. Babcock, supra,* 14 Cal.App.4th 383, the defendant grabbed each victim's hand and made her touch his crotch. One victim tried to pull her hand away; the defendant pulled it back. The court concluded: "We do not believe that grabbing the victims' hands and overcoming the resistance of an eight-year-old child are necessarily elements of the lewd acts of touching defendant's crotch." (*Id*. at p. 388.)

In each of the foregoing cases, the defendant applied some sort of physical pressure directly to the body of the victim to overcome or prevent resistance by the victim in order to commit the lewd act. In the case at bench, we cannot say that the

pulling down of victim's pants and panties demonstrates that defendant was trying to overcome or prevent resistance by victim. To hold otherwise would render meaningless the distinction between section 288, subdivision (a) and section 288, subdivision (b). Accordingly, we conclude that there was insufficient evidence of force.

Nor do we find sufficient evidence of duress. "The term 'duress' means a direct or implied threat of force, violence, danger, [hardship] or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed, or (2) acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim and [his] [her] relationship to the defendant, are factors to consider in appraising the existence of duress." (CALJIC No. 10.42.)

Relying on this court's decision in *People v. Espinoza* (2002) 95 Cal.App.4th 1287 (*Espinoza*), defendant asserts that the "mere fact that defendant was [victim's] father and larger than her combined with her fear, if any, and limited intellectual level are not sufficient to establish that the acts were accomplished by duress.[6] . . . In the present case, as in *Espinoza*, there was no evidence that the defendant grabbed, restrained or cornered the victim during the molestation. Nor was there evidence that the victim cried, or offered resistance. Instead, the evidence only established that the defendant lewdly touched a victim who made no oral or physical response to his acts."

In *Espinoza*, the defendant molested his 12-year-old daughter, L., on five occasions. (*Id*. at. p. 1292.) The daughter was " 'very scared' " and " 'frightened.' " (*Id*. at p. 1293.) During the fifth molestation, the defendant engaged in several lewd acts with the daughter. When he attempted to put his penis in her vagina, she moved to prevent penetration. For this act, the defendant was convicted of attempted rape and forcible

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[6] Victim suffered from petit mal seizures. We assume that this is what defendant is referring to when he refers to victim's limited intellectual ability.

lewd act pursuant to Penal Code section 288, subdivision (b). (*Id*. at pp. 1291-1293.) The trial court found the presence of duress for these two counts based on the daughter's dependence on the defendant, the size and age disparities, the daughter's limited intellectual ability and her fear of the defendant. (*Id*. at p. 1319.)

On appeal, this court found that there was insufficient evidence of duress stating: "The only way that we could say that defendant's lewd act on L. and attempt at intercourse with L. were accomplished by duress is if the mere fact that he was L.'s father and larger than her combined with her fear and limited intellectual level were sufficient to establish that the acts were accomplished by duress. . . . Duress cannot be established unless there is evidence that the 'victim ['s] participation was impelled, at least partly, by an implied threat . . . .' [Citation.]" (*Id*. at p. 1321.)

The Attorney General argues that in contrast to *Espinoza*, the evidence of duress in this case was sufficient to support defendant's conviction. The Attorney General contends, without citation to the record, that in this case "the victim testified that not only did [defendant] use force to pull down her pants and panties, but also [defendant] told her, 'Don't tell.' And the victim knew that, if she told, she risked severe beatings from her mother who believed that she lied and who had beaten her on other occasions." Thus, "there was direct evidence that [defendant] instructed the victim not to tell, and an implied threat of force or violence against the victim that was missing in *Espinoza*."

The Attorney General's attempt to distinguish *Espinoza* is unavailing. First, we find nothing in the record to support the Attorney General's assertion that victim testified that defendant removed her pants and panties by force. Second, we find nothing in the record to support the assertion that victim knew that if she told about the acts of lewd touching, victim knew that her mother would beat her. Moreover, there is simply nothing in the record from which we can infer that defendant directly told victim or even inferred what might happen if she told anyone about the lewd touching.

We find no evidence in the record that defendant utilized any direct or implied threat in accomplishing the lewd acts on victim. Consequently, the section 288, subdivision (b) conviction must be reduced to reflect a conviction of the lesser included offense of violating section 288, subdivision (a). (*People v. Kelly* (1992) 1 Cal.4th 495, 528.)

The Romero Hearing

As noted, following the trial court's denial of his *Romero* motion, the defendant was sentenced to 25 years to life. The Attorney General concedes that if this court finds the evidence supports only the lesser included offense of a violation of section 288, subdivision (a), the case should be remanded for a new sentencing hearing and defendant should have an opportunity to renew his motion to strike the prior strike felonies.

The decision to strike a strike prior is an individualized one based on the particular aspects of the current offense for which the defendant has been convicted, and on the defendant's own history and personal circumstances. (*People v. McGlothin* (1998) 67 Cal.App.4th 468, 474.) Accordingly, we agree that this case must be sent back for a new sentencing hearing at which defendant must be afforded the opportunity to renew his motion to strike the prior strike felonies.

Pre-Sentence Conduct Credits

Defendant contends that the trial court erred in failing to award him any presentence conduct credits (§§ 4019, 2933.1, subd. (c)).

Section 4019, subdivision (a)(4), states: "The provisions of this section shall apply . . . [¶] [w]hen a prisoner is confined in a county jail . . . following arrest and prior to the imposition of sentence for a felony conviction." Subdivision (b) provides that "for each six-day period in which a prisoner is confined in or committed to a [county jail], one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned . . . ." Subdivision (c) provides that "[f]or each six-day period in which a prisoner is confined in

or committed to a [county jail], one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established . . . ." Furthermore, subdivision (e) provides: "No deduction may be made under this section unless the person is committed for a period of six days or longer." Moreover, subdivision (f) provides: "It is the intent of the Legislature that if all days are earned under this section, a term of six days will be deemed to have been served for every four days spent in actual custody."

Section 2933.1 provides: "Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933. [¶] (b) The 15-percent limitation provided in subdivision (a) shall apply whether the defendant is sentenced under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2 or sentenced under some other law. However, nothing in subdivision (a) shall affect the requirement of any statute that the defendant serve a specified period of time prior to minimum parole eligibility, nor shall any offender otherwise statutorily ineligible for credit be eligible for credit pursuant to this section. [¶] (c) Notwithstanding Section 4019 or any other provision of law, the maximum credit that may be earned against a period of confinement in, or commitment to, a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest and prior to placement in the custody of the Director of Corrections, shall not exceed 15 percent of the actual period of confinement for any person specified in subdivision (a)."

In awarding defendant presentence credits, the probation officer noted that defendant had 449 days of actual credit, but "no additional days according to the appropriate case law which is noted." The case law noted in the probation report is *In re Cervera* (2001) 24 Cal.4th 1073.

Relying on *In re Cervera*, *supra*, 24 Cal.4th at page1078 (*Cervera*); *People v. Buckhalter* (2001) 26 Cal.4th 20, 31 (*Buckhalter*); and *People v. Stofle* (1996) 45 Cal.App.4th 417, the Attorney General argues that section 2933.1 applies only to sentences under the "Determinate Sentencing Act of Penal Code section 1170." Thus, because defendant was sentenced to an indeterminate sentence under the "Three Strikes" law he is not entitled to any presentence conduct credits.

Hence, the precise issue we must decide is whether a defendant with a violent third strike, sentenced solely to an indeterminate term, may receive presentence conduct credits pursuant to section 4019, and, if so, whether such credits are subject to the 15 percent limitation of section 2933.1.

In *In re Martinez* (2003) 30 Cal.4th 29, (*Martinez*), our Supreme Court aptly described the difficulty in analyzing issues of the "complex array of presentence and postsentence credit schemes" instituted by the Legislature to serve various functions. The Supreme Court noted: "As we observed in *Buckhalter,* this complexity ' " 'is likely to produce some incongruous results and arguable unfairness when compared to a theoretical state of perfect and equal justice. [Because] there is no simple or universal formula to solve all presentence credit issues, our aim [must be] to provide . . . a construction [of the statutory scheme] which is faithful to its language, which produces fair and reasonable results in a majority of cases, and which can be readily understood and applied by trial courts.' " ' [Citations.]" (*Id*. at p. 34.)

The *Martinez* court described several scenarios, none of which is the exact procedural posture in the case at bench, a third strike violent offender with no determinate sentence. In so doing the court stated: "A nonviolent offender may receive a credit up to 50 percent of her actual presentence confinement. (§ 4019.) If she has no prior strikes, she may earn 100 percent credit postsentence (one day of conduct credit for each day actually served) (§ 2933, subd. (a)), whereas a recidivist with a prior strike may earn postsentence credits only up to 20 percent of the total prison sentence (§§ 667, subd.

(c)(5); 1170.12, subd. (a)(5)), and an offender with two prior strikes is denied *any* postsentence conduct credit. (*In re Cervera* (2001) 24 Cal.4th 1073, 1076 [103 Cal.Rptr.2d 762, 16 P.3d 176].)" (*Martinez*, *supra*, 30 Cal.4th at pp. 34-35.)

The question in the case at bench involves presentence, not postsentence credit; the Attorney General does not dispute credit for actual presentence time served but argues only that the conduct credits were properly denied.

Section 4019 is the general statute governing credit for presentence custody. Absent contrary authority, "a defendant receives what are commonly known as conduct credits toward his term of imprisonment for good behavior and willingness to work during time served prior to commencement of sentence. (§§ 2900.5, 4019; *People v. Sage* (1980) 26 Cal.3d 498, 501 . . . .)" (*People v. Thomas* (1999) 21 Cal.4th 1122, 1125 (*Thomas*).)

In *Thomas,* the Supreme Court held that presentence conduct credits awarded pursuant to section 4019 are proper where the current convictions are not "violent" within the meaning of section 667.5, subdivision (c), and defendant did not have solely an indeterminate sentence. In such a situation "sections 2933.1 and 667.5(c)(7) limit a defendant's presentence conduct credit to a maximum of 15 percent only when the defendant's current conviction is itself punishable by life imprisonment, not when it is so punishable solely due to his status as a recidivist." (*Thomas, supra,* at p. 1130.) In *Thomas,* however, the defendant's presentence conduct credits did not exceed his determinate term. Accordingly, the *Thomas* court noted in footnote 3, "we are not asked in this case to decide whether a three strikes defendant is entitled to presentence conduct credits when [as in the case at bench] he has solely an indeterminate sentence. [Citations.]" (*Thomas, supra,* 21 Cal.4th at p. 1130.)

In *People v. Henson* (1997) 57 Cal.App.4th 1380 (*Henson*), the Fourth District Court of Appeal was asked to decide whether the limit on conduct credits in section 2933.1 should apply where a third strike defendant's current conviction was a nonviolent

felony.[7] (*Id* at p. 1382.) In footnote 10, the *Henson* court noted: "The Attorney General appears to suggest section 4019 does not grant presentence conduct credits to defendants who receive an indeterminate sentence. He points out that *People v. Hill* [(1995)] 37 Cal.App.4th 220, which held section 4019 applies to three strikes cases absent application of section 2933.1, involved a determinate sentence. Nothing in *Hill* or section 4019 itself suggests application of the statute should be so limited." (*Henson*, *supra*, at p. 1390.)

Accordingly, the *Henson* court concluded, "the limit on conduct credits in section 2933.1 should apply only where the current conviction, considered without reference to the three strikes law, qualifies as a 'violent' felony." (*Id*. at p. 1389.)

This court in *People v. Williams* (2000) 79 Cal.App.4th 1157 awarded presentence custody credit under section 4019 where the defendant received five concurrent indeterminate terms with several enhancements. (*Id*. at pp. 1161, 1175-1176.)

More recently, in *People v. Buckhalter*, *supra*, 26 Cal.4th 20, our Supreme Court described its decision in *Thomas* as holding that "restrictions on the rights of Three Strikes prisoners to earn term-shortening credits do not apply to confinement in a local facility prior to sentencing." (*Id*. at p. 32.) Accordingly, the Supreme Court noted: "We emphasized that when limiting the credit rights of offenders sentenced thereunder, the Three Strikes law (§§ 667, subd. (c)(5), 1170.12, subd. (a)(5)) expressly refers only to '*post*sentence . . . credits,' i.e., those ' "awarded pursuant to [a]rticle 2.5" ' (*People v. Thomas* (1999) 21 Cal.4th 1122, 1125 . . .), and 'does not address *presentence* . . . credits' for Three Strikes defendants (*ibid.* . . .)." (*Ibid*.)

In addition, several other cases decided by the California Supreme Court have discussed various types of conduct credits. *In re Cervera, supra,* 24 Cal.4th 1073, 1074, discussed prison conduct credits (not the presentence credits at issue in the case at bench)

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[7] For each of his current offenses, the defendant had been sentenced to an indeterminate term of 25 years to life. (*Henson*, *supra*, 57 Cal.App. 4th at p. 1382.)

and, approving *People v. Stofle, supra,* 45 Cal.App.4th 417 (*Stofle*),[8] held the Three Strikes law does not authorize or allow a defendant with three strikes to be awarded *prison conduct credits* for use against a mandatory *indeterminate* term of life imprisonment. In so doing, Justice Mosk, writing for the court, rejected Cervera's argument that the indeterminate term's minimum term was "itself a determinate term." (*Cervera, surpa,* 24 Cal.4th at p. 1081.)

In *People v. Cooper* (2002) 27 Cal.4th 38, the Supreme Court concluded that Penal Code section 2933.1 (15 percent limitation of presentence conduct credits for specified felons, including murderers) applied to limit the defendant's award of presentence conduct credits under the pre-June 1998 version of Penal Code section 190, designating the punishment for murder. (*Id*. at pp. 46-47.) (Almost two weeks after the murder in *Cooper,* Proposition 222 prohibited the award of postsentence prison worktime credits and presentence conduct credits.) In explaining the history of the relevant statutes, Justice Chin, citing *Buckhalter, supra,* 26 Cal.4th 20, 31-32, wrote that "section 2933.1 limits presentence conduct credits authorized under section 4019" and specifically limits murder defendants to no more than 15 percent of worktime credits. (*Cooper*, *supra*, 27 Cal.4th at p. 43.) Moreover, the court again distinguished the authorization of presentence conduct credits in sections 2900.5 and 4019 from article 2.5, authorizing only postsentence prison conduct credits. (*Id.* at p. 46.)

In re Martinez, *supra*, 30 Cal.4th 29, applied postsentence rules to time spent in state prison from initial sentencing to appellate court reversal; defendant later pleaded guilty to petty theft with priors and the trial court dismissed one of her prior strikes.

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[8] In *Stofle, supra*, 45 Cal.App.4th 417, the First District Court of Appeal held that the limitation in section 667(c)(5), does not apply to an indeterminate life term. Hence, in that situation, release on parole is barred until a specified minimum term is served. The *Stofle* court applied "the general rule that release on parole is barred until a specified minimum term has elapsed (§ 3046)." (*Id.* at p. 421.)

Petitioner unsuccessfully argued that such time should be viewed as presentence custody. However, all parties agreed that, even after being sentenced as a second strike defendant, petitioner was entitled to presentence conduct credits under section 4019 for the period before her initial sentencing and the period from reversal to second sentencing. (*Id.* at p. 31.) The second sentence in *Martinez,* for a petty theft with a prior conviction, was a term of nine years (*id.* at p. 38, dissent by Kennard, J.), a determinate term unlike that in the case at bench.

Mindful of the array of cases upon which we have just expounded, we turn to the case at bench.

"Section 2933.1(c) generally limits presentence [conduct] credits to 15 percent of actual time served when a defendant . . . is convicted of a violent felony listed in section 667.5, subdivision (c)." (*People v. Daniels* (2003) 106 Cal.App.4th 736, 739; accord *People v. Hawkins* (2003) 108 Cal.App.4th 527, 531-532.) Defendant was convicted of a crime listed in section 667.5, subdivision (c),[9] and therefore is bound by the 15 percent limit in section 2933.1 (see *People v. Thomas, supra,* 21 Cal.4th 1122, 1130) unless, as the Attorney General argues, defendant's indeterminate sentence precludes him from receiving any custody credits.

The provisions of section 2933.1 are contained in article 2.5 of the Penal Code. The provisions currently contained in article 2.5 authorize only postsentence *prison* conduct credits. Section 4019, which authorizes the award of presentence conduct credits, is in a different article. (*People v. Cooper*, *supra*, 27 Cal.4th at p. 46.) "Although section 2933.1 is currently contained in article 2.5, that section does not authorize the

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[9] This is so even though we have reduced defendant's conviction to a violation of section 288, subdivision (a). Section 667.5 makes no distinction between subdivisions (a) and (b), but simply states: "(6) Lewd acts on a child under the age of 14 years as defined in Section 288."

award of presentence conduct credits. It simply limits the presentence credits authorized by section 4019. [Citations.]" (*Ibid*.)

Under section 2900.5, a defendant receives credit towards his term of imprisonment for time in custody before the commencement of a prison sentence. Subdivision (a) of that section provides in relevant part: "In all felony and misdemeanor convictions . . . when the defendant has been in custody . . . all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, and including days credited to the period of confinement pursuant to Section 4019, shall be credited upon his term of imprisonment . . . ."

We find nothing in the Three Strikes law limitation on prison conduct credits that applies to presentence conduct credits awarded pursuant to section 4019. The Three Strikes law limits only "credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3" of the Penal Code. (§ 1170.12, subd. (a)(5); *People v. Caceres* (1997) 52 Cal.App.4th 106, 1110)

Presentence conduct credits may not be used, however, to reduce either a minimum term of 25 years or a maximum term of life. (*People v. Carpenter* (1979) 99 Cal.App.3d 527, 535-536; § 3046.)[10] Accordingly, we conclude that after defendant has served the minimum term, the Board of Prison Terms may use defendant's section 4019 credits, limited in his case by section 2933.1, in determining defendant's release date. (*Ibid*.)

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[10] Section 3046 states in pertinent part: "(a) No prisoner imprisoned under a life sentence may be paroled until he or she has served the greater of the following: [¶] (1) A term of at least seven calendar years. [¶] (2) A term as established pursuant to any other provision of law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole."

Thus, on remand, even if defendant's sentence is solely an indeterminate term, he is entitled to an award of section 4019 credits limited by section 2933.1.

Disposition

The Penal Code section 288, subdivision (b) conviction shall be modified to reflect a conviction of the lesser included offense of violating Penal Code section 288, subdivision (a). We remand the cause to the trial court for a new sentencing hearing; at which defendant may make a motion to strike one or more of the prior strikes.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.